Agency File No. 19-00189

CANADIAN TRANSPORTATION AGENCY

IN THE MATTER OF:

Investigation into possible freight rail service issues in the Vancouver area, pursuant to subsection 116(1.11) of the *Canada Transportation Act*, S.C. 1996, c.10, as amended

BETWEEN:

CANADIAN TRANSPORTATION AGENCY

- and –

CANADIAN NATIONAL RAILWAY COMPANY

RESPONSE ON BEHALF OF CANADIAN NATIONAL RAILWAY COMPANY

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I. INTRODUCTION

1. On January 14, 2019, the Canadian Transportation Agency (the "**Agency**") initiated an investigation into possible rail freight service issues in the Vancouver area (the "**Proceeding**") pursuant to s. 116(1.11) of the *Canada Transportation Act* (the "**CTA**" or the "**Act**").[1] The investigation was initiated based upon "…receipt of communications and information from shipper organizations and other parties regarding current freight rail service levels in and around the Vancouver area."

2. Canadian National Railway ("**CN**") has already described the complex nature of Vancouver as a logistics hub of both national and global importance. This hub is impacted by myriad interconnected parties, including railways, shippers, terminals and the port. The relevant traffic to, through, and from Vancouver can be impacted by significant and unpredictable exigencies at any given time. The reference period for the Proceeding dealt with certain of these circumstances.

3. However, this Proceeding was not a particularly useful vehicle through which to learn about, let alone potentially alter, the complexities associated with rail transport in the Vancouver area. By its very nature, an investigation by the Agency entails the possibility of a finding of wrongdoing on the part of the relevant railway(s). Notwithstanding this, as will be discussed in detail within, the railways were only provided with a vague notion of what, exactly, they were under investigation for and what, if any, conduct was alleged to have been a breach of their statutory obligations. Presumably, CN might learn the case against it when the final decision is rendered. With respect, without the necessary level of focus on specific, demonstrable issues centred on actual traffic movements or requests, this Proceeding devolved into a hasty and unprincipled review of a handful of certain logistical topics.

4. Turning to the issues at hand, CN has been asked by the Agency Panel to respond to certain questions in the context of its level of service obligations, and it has endeavoured to do so. The specifics are below. However, at a high level, CN submits that it cannot be found in breach of its service obligations in the context of this Proceeding for three overarching reasons.

5. First, this Proceeding has resulted in significant breaches of procedural fairness and natural justice. As alluded to above and explained within, to this date CN does not know the case to be met. This has been stated repeatedly by CN throughout the course of this investigation. As a direct result, CN has also been deprived of a reasonable opportunity to defend itself. CN was not provided an opportunity to test or challenge any of the so-called evidence about its operations during the reference period. The absence of this fundamental right, coupled with a medley of other issues, has severely impacted CN's ability to marshal its defence. With respect, any determination that CN has breached its level of service obligations would be unprincipled in these circumstances.

[1] SC 1996, c 10.

6. Second, this Proceeding fundamentally misunderstands and misapplies the level of service obligations owed by a railway under the CTA. A railway's service obligations cannot be reviewed or assessed in an entirely decontextualized manner. The form of review required by the level of service regime is inherently and necessarily fact-specific. Without sufficient particularity about the exact shipper and traffic movement at issue, the exercise becomes meaningless. Considering the railways' performance in this manner is a direct contravention of the Agency's mandate under the CTA. There is, perhaps, no better demonstration of the danger of a decontextualized proceeding than the fact that some of the traffic at issue moved under confidential contract. The Agency cannot apply the level of service analysis to this traffic, but none of the parties have any of the specifics required to appropriately delineate, explain, or understand the magnitude of this issue. As will be discussed in detail, there is no legitimate replacement or proxy for movement-specific evidence, whether under the Agency's own-motion power or otherwise, and the Agency's attempt to find one in the form of unused terminal capacity is flawed from a legal and analytical perspective.

7. The above-described problem is exacerbated by the fact that the metric of unused terminal capacity is also factually inaccurate. This leads to the third and final point. The questions posed to CN and answered herein are predicated on a flawed premise: *i.e.* the Agency has presumed CN could have delivered more traffic during the reference period and has quantified that assumption based on calculations that are demonstrably incomplete and incorrect. The associated problems are described below.

8. In conclusion, it must be reiterated that no one – not the shippers, their respective associations, or the Agency itself – has alleged in this proceeding that CN breached its level of service obligations with respect to a single, identified movement of traffic. The own-motion power does not reverse the onus under the level of service regime to actually identify what is at issue, and the Agency cannot use this incremental statutory development to ask the railway to justify its operations in an unmoored sense and at large. CN moved over 225,000 cars to the Greater Vancouver area during the four month period at issue.[2] Asking CN to prove that it did not fail in meeting its statutory service obligations without any context is impossible, and it bears no relationship to the CTA or the relevant legal principles.

II. FACTS AND BACKGROUND

A. Vancouver Operations

9. This Agency Proceeding focuses on whether railways fulfilled their statutory service obligations in the Vancouver area from October 2018 to January 2019.

[2] During the period October 2018 to January 2019, CN moved an average of 1970 cars per day into the Greater Vancouver area. On average, there were 18 trains per day from an average of 98 shippers and 80 origin stations.

10. Greater Vancouver is a complex logistics hub. CN is one of three Class I railways that operate in the Vancouver area, in addition to one Class II railway, 27 port terminals, and a multitude of warehouses, transloads, and container stuffing facilities. It is the busiest port in Canada, and not surprisingly, on CN's network: 30% of CN's annual loaded carloads arrive or leave from the West Coast of Canada, with Vancouver representing 65% of that traffic.[3]

11. During October 2018 to January 2019, traffic in Vancouver unexpectedly increased by over 10% as compared to the same timeframe in the previous year. That is a fact that no participant has challenged. Indeed, 2018 was a record year for the Vancouver port, with overall cargo volumes reaching a record high of 147 million tonnes, up 3.5% from 2017. There were also record volumes reported for containers, potash, canola products and barley.[4]

12. The influx of traffic during this period caused temporary congestion in the Vancouver supply chain that needed to be managed in order to avoid significant slowing of traffic. As CN has already informed the Agency during this Proceeding and as will be made clear again in this submission, CN promptly took action and implemented measures to mitigate the effects of this unanticipated, significant increase in traffic. CN's efforts in this regard were crucial in ensuring the continued fluidity of the supply chain through the Vancouver area and beyond. This has been recognized by many third parties.

B. Procedural History

13. On January 14, 2019, the Agency initiated this Proceeding into possible rail freight service issues in the Vancouver area pursuant to s. 116(1.11) of the CTA by way of Decision LET-R-5-2019 (the "**Initiating Decision**"). The Agency was prompted to launch the Proceeding by communications and information received from various shipper organizations regarding "current, perceived freight rail services issues in the Vancouver area." The stated purpose of the Proceeding is to "determine whether railways are fulfilling their service obligations in the Vancouver area and if not, what remedies should be ordered".

14. There were initially eight participants in the Proceeding:

(a) five "**Shipper Participants**": the Forest Products Association of Canada ("**FPAC**"), Western Grain Elevator Association ("**WGEA**"), the Canadian Oilseed Processors Association ("**COPA**"), the Freight Management Association of Canada ("**FMA**"), and the Western Canadian Shippers' Coalition ("**WCSC**"); and

[3] These figures do not include empty cars moved by CN through Vancouver.

[4] Media Release: Record cargo volumes through the Port of Vancouver in 2018; https://www.portvancouver.com/news-and-media/news/record-cargo-volumes-through-the-port-of-vancouver-in-2018/

(b) three "**Railway Participants**": CN, Canadian Pacific Railway ("**CP**"), and BNSF Railway ("**BNSF**")

(collectively, the "**Participants**").

15. The Agency has purported to divide the Proceeding into two phases:[5] gathering information relevant to the Proceeding from the Participants (the "**First Phase**"), and analyzing that information to determine if the Railway Participants are fulfilling their service obligations under the Act (the "**Second Phase**").

(i) First Phase: Information Gathering

16. The Initiating Decision advised that Ms. Lidija Lebar was appointed by the Agency as Inquiry Officer pursuant to s. 38(1) of the CTA. The Inquiry Officer's role was to obtain documents, records, and information relevant to the Proceeding that would assist the Agency in determining whether the Railway Participants were fulfilling their service obligations. The receipt of the significant data collected was intended to permit the Inquiry Officer to prepare a summary report by January 23, 2019.

17. The Initiating Decision further directed CN to "provide any information and data in its possession that is relevant to the issues" identified therein within a mere three days. This included comprehensive waybill data, shipment and interswitching data dating back to 2015. CN complied with this direction from the Agency. By the January 17, 2019 deadline, CN provided the Inquiry Officer with over 5.8 million documents to fulfill her request, despite not being provided any specifics with respect to particular shipper(s), particular movement(s) of traffic, or particulars of any conduct alleged to be in breach of the CTA. CN also provided further information and data subsequently requested by the Agency.[6]

18. CN later learned that the other Participants had also been directed by the Agency in letter decisions dated January 14, 2019 to provide specific information and data to the Inquiry Officer in relation to the so-called "possible rail freight service issues". However, many of the Shipper Participants failed or refused to comply with the Agency's direction and did not provide the data requested. More specifically, only the WGEA provided any empirical (albeit aggregated) data to the Inquiry Officer. Many other Shipper Participants provided merely anecdotal and qualitative responses unsubstantiated by evidence, while the FMA and COPA provided no response in support of the allegations which apparently prompted the Agency to initiate this Proceeding.[7]

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[5] As will be discussed below, CN submits that there are actually four phases of an own-motion investigation under s. 116(1.11) of the CTA. Given the Agency's refusal to share any information about the authorization phase, CN knows very little about what occurred and has been left to surmise.

[6] The Inquiry Officer and her team requested additional information from CN on January 18, 20, 21, and February 13. CN provided prompt and fulsome responses to each inquiry.

[7] For example, FMA specifically requested that the Agency undertake this Proceeding yet failed to provide any of the evidence requested by the Agency on January 14. See Hearing Transcript dated January 30, 2019 at p. 257 line 5 – p. 259 line 18.

19. On January 24, 2019, the Agency provided Participants with a copy of the Inquiry Report prepared by the Inquiry Officer (the "**First Inquiry Report**"). The First Inquiry Report identified five "themes" which it noted "may be relevant in assessing whether a railway company has fulfilled its service obligations". Due to the limited data received from Shipper Participants, the First Inquiry Report failed to establish any basis upon which to continue the Proceeding. There was no evidence to support a finding of a breach of CN's level of service obligations.[8] The First Inquiry Report repeatedly referred to the anecdotal nature of the information provided by the Shipper Participants.

20. Nonetheless, the Proceeding continued. On January 29 and 30, 2019, an oral hearing (the "**Hearing**") was held in Vancouver "to contribute to the evidentiary record" by providing Participants an "opportunity to comment on the Inquiry Officer's Report, provide supplementary information, and respond to questions posed by the Agency Panel". The Shipper Participants failed to utilize this second opportunity to provide any empirical evidence to the Agency to substantiate a finding of breach against the Railway Participants. Again, the Agency received only anecdotal, one-off accounts of alleged service failures without any specific details as to which shippers and/or commodities were affected, where, or when these alleged failures occurred.

21. CN was not able to respond directly to these vague allegations. Nonetheless, CN presented substantial empirical evidence to defend its service overall in the Vancouver area from October 2018 to January 2019.

22. As it did in its initial data submission on January 17, CN complied with the Agency's directions at the Hearing. CN presented all the information it could determine was relevant at the time and comprehensively answered all the questions posed by the Agency. The Shipper Participants, conversely, did not.

23. Nonetheless, the Agency, instead of concluding the Proceeding, provided the Shipper Participants with a third opportunity to substantiate their complaints through quantitative data. The Agency invited the Shipper Participants to respond to questions posed at the Hearing and "welcomed" their provision of additional information and evidence relevant to the Proceeding, even in aggregated form.[9]

[8] The Agency has previously struck a level of service complaint when there was a dearth of evidence supporting a finding of breach: Decision No. 360-R-2014.

[9] Hearing Transcript dated January 29, 2019 at p. 138 lines 4-16; Hearing Transcript dated January 30, 2019 at p. 296 line 24 - p. 297 line 15.

24. Once again, the Shipper Participants failed during this third and final opportunity to provide the Agency with specific or empirical evidence related to CN's alleged service failures.[10] The submissions received from the Shipper Participants on February 8, 2019 were largely subjective and unsubstantiated by evidence.

25. Seemingly unsatisfied with the responses received from Participants, the Inquiry Officer sought out additional information from entities not initially involved in the Proceeding. Responses were provided by some of those entities on February 19 and 20, 2019.[11]

26. On March 6, 2019, the Agency provided Participants and interested parties with a copy of a second Inquiry Report prepared by the Inquiry Officer (the "**Second Inquiry Report**") based on the information gathered at the Hearing and subsequent submissions from Participants and other interested parties. The Second Inquiry Report retains one theme from the First Inquiry Report: embargoes/permits. However, the Second Inquiry Report abandons the other four themes identified in the First Inquiry Report and identifies two new themes which "may be relevant in assessing whether a railway company has fulfilled its service obligations": operations at CN's Thornton Yard, and port terminal capacity.

27. CN's specific comments on the Second Inquiry Report are provided below.

28. The Second Inquiry Report concluded the First Phase of the Proceeding.

(ii) Second Phase: Assessing Service

29. The Second Phase of the Proceeding, as determined by the Agency, focuses on determining whether CN and/or CP breached their common carrier obligations owed pursuant to ss. 113-116 of the Act. On March 6, 2019, the Proceeding entered into the Second Phase with the Agency's issuance of Decision LET-R-29-2019 (the "**Preliminary Decision**"). The Agency confirmed that its final decision, the conclusion of the Proceeding, would be rendered solely on the issues identified in the Preliminary Decision.[12]

30. The Preliminary Decision directs CN and CP to respond to specific questions and provides other participants with an opportunity to do so, as well. It focuses on "shortfalls or delays in the transportation of traffic" to the North Shore, and appears to coincide with the three themes from the Second Inquiry Report (i.e. congestion at Thornton Yard, port terminal capacity, and embargoes/permits). However, the Preliminary Decision does not identify any breaches of CN's statutory level of service obligations.

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[10] For example, FPAC's submission noted that "FPAC does not have any comprehensive quantitative data related specifically to car orders for shipments destined to Vancouver" and in relation to various questions posed by the Agency, that "FPAC does not have in its possession any information to contradict CN's statements at the oral hearing".

[11] Submissions were sought and received from Univar, Shell, Fibreco, Chemtrade, Viterra, Squamish Terminals Limited, Richardson International Limited, Western Stevedoring and Cargill.

[12] Preliminary Decision at para 4.

31. These submissions constitute CN's response to the questions posed in the Preliminary Decision in support of CN's position that there is no evidence establishing that CN has breached its statutory service obligations.

III. ISSUES

32. This response deals with the following issues:

(a) The Procedural Fairness of this Proceeding

(b) The Level of Service Obligations in the Context of this Proceeding

(c) Response to Second Inquiry Report

(d) Agency Conclusions regarding Terminals

(e) Specific Service Level Inquiries

(i) Contingency Plans

(ii) Resources Deployed – Crews and Locomotives

(iii) Traffic Management Measures

(iv) Embargoes on Wood Pulp Traffic

(v) Embargoes on Other Traffic

(vi) Coordination of Delivery Levels and Timing; and

(vii) Railway Infrastructure

IV. SUBMISSION

A. The Procedural Fairness of this Proceeding

33. The Agency is a standing quasi-judicial tribunal.[13] A body performing quasi-judicial functions is required to act in accordance with the common law principles of administrative law: "[e]very quasi-judicial tribunal has a duty to act in accordance with natural justice".[14]

[13] *Robotham v WestJet Airlines*, 2014 ONSC 3141 at para 16; *Bell Canada v 7262591 Canada Ltd.*, 2018 FCA 174 at para 52.

[14] See 2747-3174 *Québec Inc. c. Québec (Régie des permis d'alcool)*, [1996] 3 SCR 919 at para 121 per L'Heureux-Dubé J. (concurring) [*Régie des permis d'alcool*].

34. This generally accepted principle has a number of specific expressions. For example:

(a) All information put before a decision-maker should be disclosed to the parties involved.[15] A failure to disclose prejudicial information is fatal to a decision if the party's right to a fair hearing was consequently prejudiced.[16]

(b) The essential issues relevant to the proceedings should also be identified.[17] A party is entitled to know the case against it, and to be given a reasonable and meaningful opportunity to meet that case; and

(c) The administrative decision-making body "must be perfectly impartial" in conducting the proceedings and in rendering its decision.[18]

35. These safeguards are often interrelated – *e.g.* a failure to provide information to a party jeopardizes (and may, in fact, destroy) that party's ability to know and meet the case against it. These are all well-established principles, and there is little doubt that they apply to the Agency's own-motion power.

36. Turning to the present context, CN has repeatedly raised issues about natural justice and procedural fairness in the context of this Proceeding. For example:

(a) CN's letter of January 16, 2019 to the Agency, wherein CN expressed its concerns with respect to the Proceeding and the process to be employed. CN noted that a high degree of procedural fairness was warranted given the scope of the review and the potential severity of the consequences on the railways. CN advised the Agency that it viewed the Proceeding as being ill-defined as well as launched and handled with undue haste, requiring the production of millions of records in the course of three days. CN specifically requested a number of documents that were necessary in order to understand the case to be met against it including, *inter alia*, the communications and information exchanged between the Agency and shipper organizations underlying the decision to launch the Proceeding. The Agency denied this request over two months later, on March 19, 2019. The Agency did not respond to the balance of CN's letter.

(b) CN's letter of January 17, 2019 to the Agency, wherein CN advised that it had submitted the information demanded by the Agency on a best-efforts basis, given the timeframes imposed by the Agency. CN also advised that it was unable to respond to the Agency's request to produce other documents "relevant to the issues identified [by the Agency]" because the Agency had not, in fact, identified any issues beyond "possible freight

[15] *Hutchinson v Canada (Minister of the Environment)*, 2003 FCA 133 at para 49; *Harris v. Barristers' Society (Nova Scotia)*, 2004 NSCA 143.

[16] *Canadian Cable Television Assn. v American College Sports Collective of Canada Inc*., [1991] 3 FC 626 (FCA).

[17] See *Arsenault v Treasury Board (Department of National Defence)*, 2016 FCA 179 at para 32.

[18] See *Régie des permis d'alcool* at para 115 per L'Heureux-Dubé J. (concurring).

services issues in the Vancouver area". CN was not provided any specifics with respect to particular shippers, particular movements of traffic, or particulars of conduct alleged to be in breach of the CTA. Given that, it was impossible for CN to assess relevance or determine what, if any, supplemental information it might be required to put forward to defend itself. No response was received from the Agency to this letter.

(c) CN's letter of January 25, 2019 to the Agency, wherein CN wrote to reiterate its concerns about procedural fairness in the wake of the First Inquiry Report. CN noted that it was still unaware of the case to be met, which had evolved into certain general "themes" contained in the First Inquiry Report – some of which could not have even been guessed at, as they had not been made part of the Agency's document requests (e.g. the so-called communication "theme"). CN also advised that it had acquired information about the specific requests put to Shipper Participants by the Agency, but that it had done so informally (through Twitter and by chance). CN also noted that the Shipper Participants had, effectively, withheld evidence prior to the Hearing and that CN would not be able to adequately respond to the same at the Hearing. No response was received from the Agency to this letter.

(d) CN's submissions at the Hearing on January 30, 2019, wherein counsel for CN submitted that the railway was still unable to assess the case being made against it given the generalized, anecdotal evidence being put forth.[19] CN noted that the Shipper Participants had, once again, failed to provide the specific information ordered by the Agency and that CN was concerned that the Shipper Participants expected to be allowed to let their cases trickle in over subsequent weeks. No response was received from the Agency to these submissions.

(e) CN's letter of February 19, 2019 to the Agency, wherein it noted that it was surprised at the direction taken by the Agency following the Hearing. CN objected to the appropriateness of the Agency's continued inquiries notwithstanding its prior representation that the evidentiary portion of the Proceeding had concluded. CN noted that it was still unaware of the case to be met, which appeared to have shifted yet again based on the Agency's new inquiries, and that CN still had not received a response to its various informational requests. CN also objected to the fact that it would not be provided with an opportunity to respond to the information gathered by the Inquiry Officer for the purpose of the Second Inquiry Report prior to the issuance of the Agency's Preliminary Decision. No response was received from the Agency to this letter.

[19] For example, counsel specifically noted that there was reference from the agriculture group about a handful of movements wherein problems were encountered. For example, a shipper with seven days' dwell at origin. However, CN was not provided with information about the specific shipper, the commodity, the destination, or the timing. CN operates approximately 10,000 trains a month. It cannot respond to allegations about individual movements without sufficient particulars.

37. These issues have not been resolved or ameliorated. Indeed, there are certain fundamental errors that have been committed during the course of this Proceeding and which can no longer be cured, including, without limitation, that: (i) CN has not been advised of the case to be met; and (ii) CN has not been provided a reasonable opportunity to defend itself. Each will be commented on in turn.

(i) CN has not been advised of the case

38. CN has outlined the majority of its position above, which need not be restated. It suffices to state that CN has repeatedly advised the Agency that it does not understand the basis for or focus of the Proceeding. This has not changed. In its Preliminary Decision, the Agency directed CN to comment on the very broad question of whether it met its statutory service obligation having regard to certain listed considerations. Remarkably, however***, the Agency failed to identify the timeframe let alone the specific traffic at issue***.[20] As will be discussed in greater length below, a railway's level of service can only be understood in context – decontextualized "investigations" at large rob the parties of their ability to know the case to be met against them by definition.

(ii) CN has not been provided a reasonable opportunity to defend itself

39. CN has not been afforded the ability to adequately defend itself and respond. As noted already, a party must understand the case against it before it can be expected to meet it. While CN has provided evidence and made submissions, an investigation into "possible freight services issues in the Vancouver area" is so broad as to be meaningless. The shifting focus of the Proceeding demonstrates the point readily enough. The First Inquiry Report identified five "themes". The Second Inquiry Report and the Preliminary Decision, however, move in an entirely different direction and suggest that the Agency has belatedly shifted its focus to other themes primarily centred upon unused terminal/facility unloading capacity rather than whether a specific shipper's traffic was delivered.

40. As will be discussed in greater detail below, this is an inappropriate proxy for railway service both from a legal and factual perspective. However, this development is also procedurally unfair. For example, assume that a car was delivered to a terminal the day after it was scheduled: delivery delays do not necessarily mean that CN failed to meet its service obligations with respect to that traffic. Indeed, there are myriad reasons why, on any given day, cars may not be delivered to a terminal – many of which are not attributable to a railway. The Agency did not even ask the terminals to identify the specific cars that were to be delivered each day. In a very real sense, in the context of an own-motion investigation the Agency is required to step into the shoes of the complainant and to advance the type, volume, and quality of information that a complainant would. Shippers are required to provide this level of particularity

[20] CN is left to assume that the Agency is inquiring as to all traffic for every shipper destined to Vancouver for the four month 2018-2019 period, and not the year prior given that the own-motion investigation power is not retroactive.

or their applications will be struck. The own-motion power was not an invitation to the Agency to ignore these procedural requirements.

41. Worse yet, not only has the Agency not provided the information that CN needs to mount its defence, it has not even afforded CN the ability to do so itself by testing these allegations through interrogatories, a subsequent oral hearing, or otherwise. As stated previously, CN is hamstrung by this process.

42. This basic inability to respond has been exacerbated by a medley of other issues, including:

(a) Providing a three day window within which to generate and provide 5.8 million business records. CN is a sophisticated party with considerable resources and personnel, however, this request was unreasonable regardless of the company at issue.

(b) Holding the Hearing on 15 days' notice, before the record was ready to be finalized. The purpose of rushing to the Hearing was to allow the parties to comment on the other Participants' respective evidentiary submissions and to crystallize the record. Instead, the Shipper Participants showed up completely unprepared. It is unclear why the Hearing was not adjourned or held after the issuance of the Second Inquiry Report, which would have allowed the Participants to more adequately prepare and would have permitted comment on the subsequent findings of the Inquiry Officer. As it stands, the evidentiary phase concluded without the Railway Participants' participation, which is unprincipled. As will be discussed in detail below, the Second Inquiry Report is significantly flawed and CN should have been provided the opportunity to participate and comment before it was finalized.

(c) Allowing multiple, simultaneous rounds of information disclosure and argument in a manner that effectively prevented CN from being in a position to respond to the allegations being made against it in the usual course. The Railway Participants are the only parties in legal jeopardy in the context of this Proceeding, yet they were provided with none of the procedural safeguards usually associated with that risk.

(d) Providing differential treatment between the Railway and Shipper Participants with respect to the submission of evidence. As noted during the Hearing, the Agency's request for documents and information was an order and it was complied with by the Railway Participants. The Shipper Participants, on the other hand, were allowed multiple opportunities to lead their cases over several weeks but failed to do so. The very fact that the Agency had to issue an unplanned Second Inquiry Report after the Hearing is proof that this process did not work. The Second Inquiry Report consisted largely of shipper and terminal information that should have been sought and submitted prior to the Hearing, or not at all.

43. CN has not been advised of any alleged breach of its service obligation with respect to any particular shipper or movement. Indeed, not only has there been no complaint, there has been no evidence presented by any shipper in these proceedings of a breach of CN's service obligation that warrants a response. The Shipper Participants have refused to provide evidence despite being ordered to do so. If there had been any evidence, then it was incumbent on the Agency to identify the allegation of breach, the particulars and supporting evidence and thereafter provide CN an opportunity to respond. It has not done so. As stated by the Supreme Court of Canada in *Baker v Canada (Minister of Citizenship & Immigration)*:

> …[T]he purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.[21]

44. The manner in which this Proceeding unfolded has, by its very nature, precluded CN from putting forward its views and evidence for consideration by the Agency.

(iii) Conclusion re: procedural fairness

45. Procedural fairness exists on a spectrum. There is no definitive model that will ensure compliance in every instance, and the Agency is entitled to a certain measure of flexibility. At the outset of this process, CN indicated that it intended to fully cooperate with the Agency during its inaugural use of the own-motion power. CN followed through on this commitment, providing the Agency with considerable document and information disclosure over multiple rounds of requests as well as significant access to a core group of its executive personnel for a substantial period of time coupled with the considerable internal resources required to support those executives.

46. However, this cooperation should not be mistaken for acquiescence. CN maintains that it is owed a considerably greater degree of procedural fairness in an own-motion investigation than that which it was actually afforded in this Proceeding. This would include, at a minimum, actual, detailed, workable information about the case levelled against it, extended timeframes for response and evidence-testing, procedural safeguards such as staggered submissions, and institutional safeguards to ensure the impartiality of level of service decisions that the Agency has, itself, decided to investigate, prosecute, and adjudicate.[22] With respect, this Proceeding fell short on virtually every front with the result that CN was deprived of its right to natural justice and procedural fairness.

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[21] 1999 SCC 699 at para 22.

[22] See *Régie des permis d'alcool* at paras 45-60.

B. CN's Level of Service Obligations as Applicable to this Proceeding

47. Turning to the considerations the Agency must heed in rendering a level of service decision at the conclusion of this Proceeding, this section will cover three points. First, an overview of the level of service regime and its development will be provided, emphasizing the contextual nature of a railway's service obligations under the Act. Second, this section will address the improper use of unused terminal capacity as a proxy for evidence of actual traffic offered for carriage. Finally, a distinction will be made regarding the assessment of a railway's service obligations where a confidential contract has been entered into with a shipper. Each point will be addressed in turn.

(i) CN's statutory service obligations are inherently contextual

48. Sections 113-115 of the CTA prescribe the level of service which Canadian railways are required to provide. These provisions embody the "common carrier obligations" of railways.

49. Section 113 of the Act sets out a railway's obligation to accommodate traffic:

> 113 (1) A railway company shall, according to its powers, in respect of a railway owned or operated by it,
>
> > (a) furnish, at the point of origin, at the point of junction of the railway with another railway, and at all points of stopping established for that purpose, adequate and suitable accommodation for the receiving and loading of all traffic offered for carriage on the railway;
> >
> > (b) furnish adequate and suitable accommodation for the carriage, unloading and delivering of the traffic;
> >
> > (c) without delay, and with due care and diligence, receive, carry and deliver the traffic;
> >
> > (d) furnish and use all proper appliances, accommodation and means necessary for receiving, loading, carrying, unloading and delivering the traffic; and
> >
> > (e) furnish any other service incidental to transportation that is customary or usual in connection with the business of a railway company.

50. In short, a railway has an obligation to receive, carry, and deliver traffic offered for carriage. Railways have been subject to similar service obligations since before Confederation. For nearly as long, the law has held that a railway's level of service obligations in this respect are "permeated with reasonableness in all aspects of what is undertaken".[23] Accordingly, ***the service obligations of railways are not absolute***.

[23] *A.L. Patchett & Sons Ltd. v Pacific Great Eastern Railway*, [1959] SCR 271 at para 5 [*Patchett*].

51. Another fundamental principle governing service level disputes is that a railway's common carrier obligations cannot be enforced by the Agency in the abstract. Under a level of service investigation under s. 116(1), the Agency's jurisdiction to review and uphold a railway's common carrier obligations only arises upon the receipt of a complaint from an applicant. Generally speaking, the receipt of such a complaint triggers an adversarial process between the railway and the complaining shipper. The Agency is the administrative body tasked with adjudicating such disputes.

52. This is a basic but fundamental point. A railway is not presumed to be in breach of its level of service obligations simply upon receipt by the Agency of a complaint from a shipper. Rather, the onus rests with the applicant to prove a specific service failure on a balance of probabilities.[24] A failure to do so attracts consequences. For example, in Decision No. 360-R-2014 the Agency refused to entertain a level of service complaint where the applicant failed to provide specific evidence to support its allegations:

> The Agency is of the opinion that CCGA's application presents no material facts or evidence as to which car orders were not filled, or when or why the car orders were not filled or how CN's or CP's level of service obligations have been breached with respect to these car orders.
>
> ...
>
> The Agency notes and agrees with CP's statement that CCGA's complaint provides no specific information connecting the matters raised to any failure by CP to meet its common carrier obligations. The Agency finds that the allegations are no more specific with respect to CN. As a result, the Agency finds that the complaint can neither be responded to by CP or CN nor determined by the Agency.[25]

53. In short, specific details of an alleged breach and evidence in support thereof are necessary for the Agency to properly investigate a railway's provision of service, and for the railway to adequately respond to such allegations. Context is paramount.

54. This observation also accords with the Agency's more recent decisions on service level complaints, for example Letter Decision No. 2014-10-03 ("***LDC***").

55. In *LDC*, a shipper brought a service complaint against CN pursuant to s. 116(1) of the CTA. In describing the level of service regime under the CTA, the Agency stated that "the obligation of a railway company is owed to ***each individual shipper*** ***in respect of*** ***whatever traffic is tendered*** ***to the railway company*** ***by each shipper***."[26] Then, to determine whether CN had breached its common carrier

[24] This is a well-established principle recognized in both the civil and administrative context, and by the Agency itself: *Russel Metals Inc. v Canadian Pacific Railway Company*, Decision No. 273-R-2012 dated July 5, 2012 at paras 9-12.

[25] Decision No. 360-R-2014 at paras 42 and 45.

[26] *LDC* at para 23 [emphasis added].

obligations, the Agency developed a contextual test to be used in examining level of service applications, called the Evaluation Approach.

56. The Evaluation Approach asks three questions:

1. Is the shipper's request for service reasonable?
2. Did the railway company fulfill this request?
3. If not, are there reasons that could justify the service failure?
    a. If there is a reasonable justification, then the Agency will find that the railway company has not breached its level of service obligations;
    b. If there is no reasonable justification, then the Agency will find that there has been a breach of the railway company's level of service obligations and will look to the question of remedy.[27]

57. The Evaluation Approach is an inherently and highly factual exercise. Answering each of the three steps necessarily requires a case-by-case examination of the particular facts at hand. The Agency must look at each specific movement put at issue by a specific shipper to determine whether that shipper's request was reasonable, whether the railway fulfilled that request, and if not what specific factors are present that may reasonably justify the failure to fulfil the request. In describing the governing analysis, the Agency stated as follows:

> In other words, the compliance of a railway company with its level of service obligations to a shipper must be assessed ***having regard to that specific shipper's individual requests for rail services***, not simply according to the railway company's assessment of the combined requests of all shippers or of groups of shippers, or its car allocation or rationing policies or programs.
>
> [Emphasis added][28]

58. Indeed, this highly contextual and fact-specific approach has been enshrined by legislation. Bill C-49 recently amended the CTA to include mandatory factors that the Agency ***must*** consider when determining a level of service application. Like the Evaluation Approach, the factors listed in s. 116(1.2) require the Agency to consider the particular context of each putative traffic movement to define the parameters of reasonableness. The factors in s. 116(1.2) define "clearly and robustly... for the first time in over 100 years" what adequate and suitable service must entail.[29] Those factors are:

(a) the traffic to which the service obligations relate;

(b) the reasonableness of the shipper's requests with respect to the traffic;

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[27] *LDC* at para 36.

[28] *LDC* at para 24.

[29] Hansard, Senate Debates, Vol. 150 No. 158, 09 November 2017, p. 4164.

(c) the service that the shipper requires with respect to the traffic;

(d) any undertaking with respect to the traffic given by the shipper to the company;

(e) the company's and the shipper's operational requirements and restrictions;

(f) the company's obligations, if any, with respect to a public passenger service provider;

(g) the company's obligations in respect of the operation of the railway under this Act;

(h) the company's contingency plans to allow it to fulfil its service obligations when faced with foreseeable or cyclical events; and

(i) any information that the Agency considers relevant.

59. Each of these factors can only be understood in relation to the specific movement at issue, as well as the larger context within which the traffic was presented to the railway. The railways do not owe a duty at large to move all traffic regardless of circumstance. Rather, a specific duty is owed to each specific shipper with respect to each specific movement. Potential breaches of a railway's service obligations must be investigated and analyzed through this lens.

60. Importantly, and perhaps most fundamentally for the purpose of this Proceeding, ***the basic principles outlined above are not altered when the Agency commences an investigation by its own motion under s. 116(1.11)***, as opposed to when it receives a formal complaint from a shipper under s. 116(1). The factors in s. 116(1.2) are statutorily mandated and must be considered regardless of how the level of service analysis was initiated. These factors were introduced by Parliament in Bill C-49 at the same time as the own-motion power, and these factors are intended to equally apply to shipper-initiated investigations and Agency-initiated investigations.

61. The question becomes, how can the Agency consider these specific factors in the context of an own-motion investigation when it does not generate the level of detail required to drill down to individual traffic movements? Without this data, the Agency cannot present a case against a railway and the railway cannot be expected to meet the same, by definition. In the absence of an allegation of a specific breach, CN cannot be asked to prove that it met its service obligation in the abstract. Nor can it be asked to prove that it met its service obligation with respect to the thousands of movements of traffic over the four month period relevant to this Proceeding.

62. The Agency's determination to proceed in this manner without specific data effectively ignores the mandates of the CTA as well as the Agency's own level of service jurisprudence.

(ii) ***Unused terminal capacity is not an appropriate measure for assessing service obligations***

63. As described above, the manner in which the Agency has carried out this Proceeding prevents the Agency from adequately considering the factors that it is statutorily mandated to consider by s. 116(1.2). Insufficient data has been gathered by the Agency to determine what specific traffic movements are at issue during the reference period.

64. Perhaps recognizing this, the Agency has shifted focus to the aforementioned unused terminal capacity as a "stand in" for unmet service requests. This, however, is an entirely inappropriate substitute. As discussed in detail below, there is no way for CN to test whether the terminal capacities outlined in the Second Inquiry Report are accurate. However, even assuming the terminal capacities noted in Part 2 of the Second Inquiry Report are accurate, terminal capacity is not the appropriate proxy for a shipper request.

65. Rail service is a derived demand service. Demand for rail service varies throughout the year based on seasonality and market cycles. While demand is dynamic, terminal capacity is static. It is not appropriate to presume that "terminal capacity" equals "shipper demand". Analyzing unused terminal capacity tells the Agency nothing about whether a specific shipper ordered traffic and/or whether that traffic was delivered. The Agency cannot even begin to consider whether the shipper's request for carriage of traffic was reasonable using this metric – indeed, the Agency cannot even determine whether a shipper made a request in the first place. Utilizing this metric as a substitute for traffic data is misleading.

66. Moreover, even if one presumes that there was demand matching terminal capacity, the Agency cannot assess why that traffic was not delivered without first identifying the actual traffic at issue. What if the shipper failed to release the traffic or access issues precluded CN from picking up the traffic? The Court in *Patchett* recognized that a railway cannot be faulted in such circumstances.[30] What if delivery to a terminal with unused capacity on a particular day was delayed to another day for reasons outside of the railway's control – such as vessel delays, inadequate labour at the terminal, etc.?

67. Admittedly, all of this is speculative. It cannot be confirmed without traffic-specific information. However, it is no more speculative than the Agency presuming that unused terminal capacity equals shipper demand,[31] assuming that those shipper demands were reasonable, and that the "delivery shortfall" based on terminal capacity was the responsibility of the railway. None of this can be assumed.

[30] See *Patchett* at para 12: "To the duty of the railway to furnish services there is a correlative obligation on the customer to furnish reasonable means of access to his premises."

[31] Indeed, as discussed below, given the underutilization of permits it appears as though the exact opposite was more likely.

In this respect, terminal capacity is not particularly useful, and it cannot ground a finding of breach much less be the basis of a remedial order.

(iii) The Agency has not considered the impact of confidential contracts

68. Entirely apart from the contextual factors that the Agency is required to (but cannot) consider in the context of this Proceeding, it has not considered the impact of confidential contracts on the traffic subject to the reference period. Pursuant to ss. 113(4) and 116(2), a confidential contract between a shipper and railway will supersede the common carrier obligations found in ss. 113-116. Those sections provide:

> 113(4) A shipper and a railway company may, by means of a confidential contract or other written agreement, agree on the manner in which the obligations under this section are to be fulfilled by the company.
>
> ...
>
> 116(2) If a company and a shipper agree, by means of a confidential contract, on the manner in which service obligations under section 113 are to be fulfilled by the company, the terms of that agreement are binding on the Agency in making its determination.

69. The Agency has confirmed that where a confidential contract exists, the Agency's determination of a level of service complaint "is bound by the terms of the confidential contract".[32] Moreover, the Federal Court of Appeal in *Canadian National Railway v Viterra Inc.* confirmed that the existence of a confidential contract overrides the principles of *Patchett* and the Evaluation Approach:

> Where, however, the parties have entered into [a confidential contract], the test of reasonableness enunciated in *Patchett* will not apply and the Proceeding which paragraph 116(1)(a) of the *CTA* requires the Agency to perform will be restricted by the terms of the written agreement which shall be binding on the Agency. In such circumstances, a railway company will be unable to rely on an argument that it could not reasonably be expected to fulfill the obligations found in the confidential contract. The parties to such a contract will be held to their bargain by the Agency. Consequently, if the railway company fails to fulfil its obligations under the confidential contract, it will be found by the Agency to have breached its obligations under sections 113 to 115. It is on that basis that our Court upheld the Agency's decision in *Louis Dreyfus Commodities* where, at paragraph 26 of its reasons, the Court said:
>
> > The *CTA* contemplates that a shipper and a railway company may enter into an agreement that would set out the manner in which the service obligations of the railway company may be fulfilled. ***If the parties have entered into such an agreement, the service obligations of the railway company will be determined based on what the railway***

[32] *LDC* at para 37.

> ***company agreed to provide, not on whether any particular order is considered to be reasonable***.[33]

70. CN has confidential contracts with many of the shippers moving traffic to Vancouver. A significant volume of the traffic moved by CN to Vancouver from October 2018 to January 2019 was subject to confidential contracts which prescribed the manner in which CN's service obligation was to be fulfilled.

71. Taken as a whole, in the current context, the traffic at issue during the reference period is either governed by the level of service obligations under the CTA or by confidential contract. The Agency does not possess sufficient factual information to consider CN's performance in either of these respects.

C. Response to Second Inquiry Report

72. As described above, on February 1, 2019, the Inquiry Officer advised the participants that a second investigation report would be prepared taking into consideration: (i) the information gathered at the Hearing, including subsequent submissions in response to questions posed by the Agency Panel at the Hearing; and (ii) "any other information gathered by the Inquiry Officer or Agency between the start of the Agency's investigation up until the release of the Agency's preliminary decision in this case."

73. The Second Inquiry Report was provided to the Participants together with the Agency's Preliminary Decision on March 6, 2019. In addition to the information the Inquiry Officer indicated would be included, information received from non-Participants (submitted at the request of the Inquiry Officer) was also included. Three themes are identified in the Second Inquiry Report (apparently replacing the five themes from the First Inquiry Report) which the Inquiry Officer stated "may be relevant in assessing whether a railway company has fulfilled its service obligations": (i) operations at CN's Thornton Yard; (ii) port terminal capacity; and (iii) the imposition of embargoes and permits.

74. CN provides the following comment on each of the themes in the Second Inquiry Report.

(i) Operations at Thornton Railway Yard

75. The Second Inquiry Report confirms CN's evidence at the Hearing that, in the latter three months of 2018, Thornton Yard was subjected to an unprecedented and unanticipated surge in traffic destined for the North Shore and to be interchanged. Thornton Yard is the last place for traffic destined to the North Shore to be set off. Thornton Yard is a significant and robust hub which has historically handled substantial volumes of traffic. However, its physical footprint is finite and it cannot be expanded.

76. Thus, when faced with unanticipated volume surges, inclement weather, as well as physical and operational constraints at certain terminals, CN was required to undertake steps to alleviate inevitable

[33] 2017 FCA 6 at para 65 [emphasis in original].

congestion at Thornton Yard. This included adding additional crews and locomotives, imposing a pipeline management program (embargoes and permits) on pulp shippers, and temporary embargoes.

(ii) Port Terminal Capacity

77. In the Second Inquiry Report, the Inquiry Officer references "suggestions" by some Hearing participants that some of the congestion issues in the Vancouver area were attributable to the operations of port terminals/facilities. Presumably this is a reference to the evidence from CN that some terminals did not operate seven days a week or had limited weekend operations. This impacted the number and timing of rail cars which could be delivered to these particular terminals. There was also evidence that some terminals had insufficient physical track capacity to handle larger unit trains, thus limiting the volume of traffic that could be efficiently received and loaded on one spot. As a result of these two limitations at some terminals, rail cars ended up being parked in Thornton Yard, thereby contributing to the congestion.

78. Other than Ray-Mont Logistics, none of the terminals participated in the Proceeding initially. No terminals were asked to provide information to the Inquiry Officer for the First Inquiry Report. Nor were any of the terminals requested to participate in the Hearing. The Agency set February 8, 2019 as the completion date for the First Phase (information gathering) of the Proceeding. Other than Ray-Mont Logistics, none of the terminals submitted additional information to the Agency by the published deadline. Despite the fact that the First Phase was stated to be at an end, the Inquiry Officer sought information from other Vancouver terminals to determine whether they had "adequate capacity to unload the rail cars delivered to them." In other words, the Inquiry Officer sought to test the evidence of CN presented at the Hearing.

79. With respect, the Inquiry Officer's information gathering methodology was flawed, as was the subsequent analysis of the data from the terminals. As a result, the Inquiry Officer's conclusions on terminal unloading capacity and car delivery rates are neither accurate nor reliable.

80. On February 13 and 14, 2019, the Inquiry Officer sent emails to 24 Vancouver terminals seeking answers to five specific questions. The terminals were provided with six days to respond. The Inquiry Officer did not inform CN that these requests were being made.

81. Only 12 of the 24 ports/terminals responded, of which only six appear to be terminals served by CN on the North Shore. Despite the poor response rate, the Inquiry Officer analyzed the incomplete data and reached various conclusions on terminal unloading capacity. This is problematic, given that CN did not suggest that every North Shore terminal suffered from reduced unloading capacity due to physical or operational limitations. Moreover, the Inquiry Officer has no information with respect to the unloading capacity and car delivery rates for those terminals who chose not to participate in this Proceeding.

82. Beyond these problems with respect to the Agency's approach, CN also has concerns with the methodology used by the Inquiry Officer to determine the "Unused Terminal/Facility Unloading Capacity", "Delivery Rate" and "Undelivered Cars" for those terminals which chose to participate in the Proceeding. Each of these points will be addressed.

Unused Terminal Unloading Capacity

83. In order to determine the Unused Terminal Unloading Capacity, the Inquiry Officer asked the following two questions of the terminals: (i) what is the daily unloading capacity (number of cars or container feet) of your terminal?; and (ii) what was the daily actual railcar delivery (number of cars delivered and actual arrival time) for the period in question?

84. There was no context or background included in the Inquiry Officer's email request. The terminals were not asked to explain how they calculated the daily unloading capacity, nor the assumptions made in arriving at their stated capacity. The Inquiry Officer did not take steps to validate the stated number nor how it was calculated. Rather, this information was accepted at face value as reflecting a terminal's daily unloading capacity.

85. The Inquiry Officer then subtracted the actual deliveries per day (as provided by the terminal) from the daily unloading capacity to arrive at the "Unused Terminal Unloading Capacity" expressed in an average number of cars per day. The Inquiry Officer then made the remarkable conclusion that this number represented the additional cars that could have been unloaded by the terminal each and every day during the four month period of October 2018 to January 2019.

86. The Second Inquiry Report states: "Table 3 shows that, on average, Cargill, Fibreco and Chemtrade could have unloaded …an additional 53 cars per day from October 2018 and January 2019."[34] This statement is false. A terminal's true daily unloading capacity is dependent upon a number of variables and factors, and will change on a day-to-day basis depending on internal or external factors. There are physical limitations (e.g. track and equipment capacity) and operational limitations (e.g. availability of labour, planned shutdowns, weather-related shutdowns) which affect a terminal's daily unloading capacity. Although not entirely clear from either the Inquiry Officer's question nor the answers provided, it appears the daily unloading capacity assumes a 24-hour operating day with no physical or operational limitations. Some terminals provided this information, others did not.

87. Importantly, in most of the responses, the terminals report a daily unloading capacity significantly in excess of their track capacity. Therefore, in order to achieve their daily unloading capacity, each of the terminals would require CN to spot at least two trains. This would require the terminal to be able to receive and unload the first train and have the empty cars picked up before receiving the next train(s) to

[34] Second Inquiry Report, p. 9.

unload. However, there are a number of factors which affect a terminal's ability to unload more than one train a day. Even though a terminal may have the capacity to do so on a limited basis, they do not have the capacity (e.g. labour, equipment and yard space) to work 24/7 for four months. The Inquiry Officer failed to take into account that many of the terminals do not operate seven days per week, nor 24 hours per day. This question was not asked, despite CN's evidence at the Hearing on this specific point. Nor did the Inquiry Officer consider or take into account statutory holidays where the terminals were shut down.

88. The Inquiry Officer failed to ask the terminals to provide information on the number of days the terminal was shut down or operating at reduced service levels during the four month period under investigation. Full or partial terminal shutdowns due to staffing issues, equipment failure, maintenance, port congestion, terminal congestion or weather-related limitations are not uncommon.

89. In CP's Reply and Submission filed February 8, 2019, CP provided critical information regarding the number of terminal operating days impacted by terminal slowdowns and shutdowns during the October to December 2018 period. CP tracked the number of operating days impacted by causes such as weather, slow unloading, port congestion, terminal congestion, staffing issues, maintenance and mechanical problems. Of the nine terminals measured by CP, there were a total of 828 available operating days over the three month period. Of these, 256 days were lost due to shut down or significantly impacted by slowdowns. Nearly one third of the operating days were negatively impacted.

90. The Inquiry Officer had this information when she made the email request of terminals on February 13 and 14, 2019. However, the Inquiry Officer did not ask the terminals to report on the number of operating days lost due to weather, statutory holidays, staffing issues, port congestion, terminal congestion, mechanical and maintenance down time. This information is necessary to determine what was the true unloading capacity of the terminal during the period in question. This is a critical and fatal flaw embedded in the analysis of the Second Inquiry Report.

91. A flaw like this takes on heightened importance in the present proceeding. As noted above, due to the manner in which the Agency has initiated and managed this Proceeding, CN has no right to seek information (by way of interrogatory or otherwise) from the terminals. Rather, CN was dependent upon the Agency to gather a full and proper record from participants. This issue is an apt demonstration of the danger associated with conducting an own-motion investigation in the manner the Agency has.

92. In a railway level of service complaint initiated by a shipper against CN under s. 116(1) of the CTA, CN has a right, under the Agency Dispute Resolution Rules to ask questions of adverse parties and to compel production of documents.[35] These Rules do not apply to this Proceeding and the Agency has

[35] *Canadian Transportation Agency Rules (Dispute Proceedings and Certain Rules Applicable to All Proceedings)*, SOR/2014-104, Rule 24.

not provided CN with any right to ask questions of or compel production of documents from Participants or the terminals.

93. If the terminals had been named by the Agency as participants at the outset, and the information was requested and provided for inclusion in the First Inquiry Report, CN would have at least had an opportunity at the Hearing to address the noted deficiencies in the information gathered. The Agency would have at least had an opportunity, if so inclined, to pose follow-up questions to the terminals to ensure complete and accurate information regarding the terminals' unloading capacity.

94. Instead, the Second Inquiry Report and the Preliminary Decision are based on incomplete, unreliable and inaccurate information that CN had no hand in assembling or testing. Remarkably, the Agency relies upon the specific "evidence" from terminals in its Preliminary Decision as a basis to conclude that there were "shortfalls and delays in the transportation of traffic" to the North Shore terminals and that the terminals – which is, presumably, only a reference to the handful that bothered to respond – could have loaded a significant number of additional cars each and every day during the four month period under review.

Undelivered cars

95. The Inquiry Officer's determination of CN's "Delivery Rate" and the number of "Undelivered Cars" suffers from the same flawed methodology. The questions asked by the Inquiry Officer of terminals were: (i) the daily scheduled railcar delivery (number of cars scheduled for delivery and scheduled arrival time) for the listed time periods; and (ii) the daily actual railcar delivery (number of cars delivered and actual arrival time) for the listed time periods.

96. The request included no context or background. The terminals were not asked to explain how they determined whether a car was "scheduled" or "requested" on a given day. In particular, was it scheduled or requested by a shipper or the terminal? It is not clear from the Inquiry Officer's question, nor the terminals' answers, what is meant by "scheduled for delivery" or "requested for delivery". In most responses, the terminals simply provided a daily number of cars to both questions. The Inquiry Officer accepted these numbers at face value and took no steps to validate the same. The information sought and provided is insufficient – it does not allow the Agency or CN to determine whether the "scheduled delivery" numbers are accurate and reliable.

97. The Inquiry Officer accepts the terminals' daily numbers as a proxy for what CN should have delivered to the terminals on each day.[36] In doing so, the Inquiry Officer failed to consider those same

[36] As noted above, CN does not accept that this is an appropriate approach to measuring or assessing its service levels in the first instance.

factors which limit the terminals' daily unloading capacity – *e.g.* statutory holiday closure, staffing issues, terminal congestion, port congestion, weather, etc.

98. The Inquiry Officer also failed to consider the fact that the terminals' daily "requested delivery" numbers would include re-orders and are therefore grossly inflated. If, for example, a terminal requested or scheduled 50 cars on a given day and received only 40 cars, the terminal would request or schedule the 10 undelivered cars the following day. These 10 cars would be counted at least twice. The Inquiry Officer failed to obtain sufficient information from the terminals to arrive at a true and reliable number for scheduled deliveries.

99. Finally, and as noted above, with respect to those terminals owned by shippers there could be a number of reasons why cars "scheduled" for a given day would arrive the next day. For example, delays in loading at origin, vessel delays, etc. With respect to those terminals which serve a number of shippers, there are added complexities. If the shippers and terminal do not manage the pipeline (in the case of wood pulp, for example), then there may be more cars "scheduled" or "requested" for a given day than the terminal can unload.

100. Given this background, the mere fact that a car is not delivered to a terminal on the day it was "scheduled" does not equate to a failure on the part of CN to meet its level of service obligation to a shipper for that particular traffic. Nor should this measure be used as a proxy by the Agency for the reasons stated above. The terminals did not provide details on the specific cars which were "undelivered" each day. Without shipper, origin, and waybill data information, CN is not in a position to respond to the allegation that scheduled cars were not delivered.

(iii) Embargoes and Permits

101. In the Second Inquiry Report, the Inquiry Officer summarizes the submissions of the railways provided at the Hearing. With respect to the embargoes and permits imposed on terminals receiving paper and wood pulp cars, the Inquiry Officer correctly noted that this was an element of CN's Terminal Pipeline Management program. At the Hearing, CN provided evidence as to the circumstances warranting intervention by CN, namely the failure of pulp shippers and terminals to manage their own pipeline. CN also gave unrefuted evidence that the use of permits was not discriminatory. Rather the permit program was imposed only on those shippers and terminals which failed to ensure that inbound flows matched the unload capacity before the traffic was released.

102. The Second Inquiry Report notes that shipper associations "suggested" that the use of permits was excessive and/or discriminatory. However, there was no evidence presented at the Hearing, or through subsequent submissions to support this baseless allegation.

103. In its Preliminary Decision, the Agency comments on the "record" respecting embargoes and permits and references a February 8, 2019 submission by FPAC, which is not mentioned in the Second Inquiry Report: "FPAC indicated that CN's permits are issued for specific days that may not align with scheduled car delivery times."

104. It is correct that permits were issued for a period of 24 hours, but without such a constraint, having a permit process aimed at metering the flow of cars to meet a terminal's capacity would be useless. It is important to note that permits are issued to allow a waybill to be generated. At that time, the cars are at the origin and to balance the traffic with the capacity of the destination terminal, it is important that the transit time be taken into account. If a permit issued for a specific day is used 48 hours later, this would create imbalance in the number of cars going to the terminal.

D. Agency conclusions regarding specific terminals

105. The Preliminary Decision relies upon the Second Inquiry Report to reach a number of conclusions regarding alleged "shortfalls and delays" by CN in the delivery of traffic to affected terminals on the North Shore. The Inquiry Officer's conclusions are flawed and the Agency erred in relying upon them as a basis to compel CN to establish that it met its service obligations with respect to the "affected traffic".

106. Specifically, the Agency concludes as follows in the Preliminary Decision:

> [6] A key point that emerges from the record is that shortfalls or delays in the transportation of traffic primarily affected terminals on the North Shore of Vancouver (North Shore). For example:
>
> 1. Cargill Ltd. (Cargill) received 83 percent of their planned scheduled deliveries during the period from October 2018 to January 2019.
>
> 2. Richardson International Limited (RIL) received 80 percent of their planned scheduled deliveries during the period from October 2018 to December 2018.
>
> 3. Chemtrade Logistics Inc. (Chemtrade) received 75 percent of their empty car orders during the period from October 2018 to January 2019.
>
> 4. A portion of the cars received by Chemtrade and Univar Canada Inc. (Univar) were not the proper car type for the commodity that it intended to ship during the period from October 2018 to January 2019.
>
> 5. The four North Shore terminals and customer facilities sampled (Cargill, Chemtrade, Fibreco Export Inc. [Fibreco] and RIL) had additional capacity to receive cars from CN during the period from October 2018 to January 2019.

6. Lynnterm had under-utilized railcar unloading capacity, even while volumes of cars destined to Lynnterm grew at Thornton Yard.

[7] The evidence further suggests that these shortfalls and delays in the transportation of traffic were related in part to congestion at CN's Thornton Yard in October and November 2018.

107. CN disputes these conclusions reached by the Agency. Each terminal will be discussed.

(i) Cargill[37]

108. The Agency's conclusion that Cargill received 83 percent of their planned scheduled deliveries during the period from October 2018 to January 2019 is based upon the Inquiry Officer's calculation of "Delivery Rate".[38] In its email reply to the Inquiry Officer, Cargill stated its average daily scheduled rate was 150 cars and its daily actual delivery rate was 124 (83% of 150).

109. As noted, the Inquiry Officer's calculation fails to take into account the factors which affect daily unloading capacity and deliveries, such as operating hours or holidays. The Inquiry Officer did not ask Cargill for this information and instead blindly relied upon the one line answer to its email to conclude that for every day during the four month period, Cargill only received 83% of its planned scheduled deliveries.

110. That conclusion is incorrect. CN and Cargill are parties to confidential contracts which prescribe the level of service CN is required to provide to Cargill's terminal on the North Shore and Prince Rupert. For the period October 2018 to January 2019, CN met its service obligations owed to Cargill.

(ii) Richardson[39]

111. As with Cargill, the Agency's conclusion that Richardson received 80% of its planned scheduled deliveries from October 2018 to December 2018 is based upon the Inquiry Officer's calculation of "Delivery Rate".[40]

112. The Inquiry Officer's calculation suffers from the same flaws noted above for the Cargill calculation. CN and Richardson are parties to confidential contracts which prescribe the level of service CN is required to provide to Richardson's terminals on the North Shore and Prince Rupert. For the period October 2018 to January 2019, CN met its service obligations owed to Richardson.

[37] Preliminary Decision at para 6, point 1.
[38] Second Inquiry Report at p. 10.
[39] Preliminary Decision at para 6, point 2.
[40] Second Inquiry Report at p. 10.

(iii) Chemtrade[41]

113. The Preliminary Decision concludes that Chemtrade received 75% of their empty car orders from October 2018 to January 2019. It is not clear how the Agency reached this conclusion from either the Second Inquiry Report or the information submitted by Chemtrade.

114. In its reply to the Inquiry Officer, Chemtrade identifies its "maximum daily railcar loading" as 29 cars per day. During the period from October 2018 to January 2019, CN spotted on average 30 cars per day.

(iv) Chemtrade and Univar[42]

115. The Agency concludes in the Preliminary Decision that "a portion of the cars received by Chemtrade and Univar" were not the proper car type for the commodity it intended to ship. This appears to be based upon anecdotal comments in log sheets provided to the Inquiry Officer.

116. CN is not able to properly respond to these comments without further information from Chemtrade and Univar. CN was not granted that opportunity in this Proceeding.

(v) Additional Capacity at North Shore Terminals[43]

117. The Preliminary Decision concludes that the four North Shore terminals (Cargill, Chemtrade, Fibreco and Richardson) had "additional capacity to receive cars from CN" during the four month period at issue. This conclusion is based upon the Inquiry Officer's calculation of "Unused Terminal/Facility Unloading Capacity", which as noted above, is not a true reflection of additional capacity. Without further details, CN cannot comment.

(vi) Lynnterm[44]

118. The Agency concludes that Lynnterm "had under-utilized railcar unloading capacity, even while volumes of cars destined to Lynnterm grew at Thornton Yard." This finding is based upon the Inquiry Officer's conclusion[45] and Lynnterm's email reply.

119. As CN testified at the Hearing, pulp shippers only utilized 70% of the permits issued by CN during the period of the embargo with permits. Many of these pulp shippers ship traffic to Lynnterm. There was evidence that the market for pulp dropped significantly in December 2018. This explains why Lynnterm

[41] Preliminary Decision at para 6, point 3.
[42] Preliminary Decision at para 6, point 4.
[43] Preliminary Decision at para 6, point 5.
[44] Preliminary Decision at para 6, point 6.
[45] Second Inquiry Report, p. 12.

had "under-utilized railcar unloading capacity" – their terminals were full and product was not moving due to market conditions.

E. Specific Service Level Inquiries from Agency

120. In the Preliminary Decision, the Agency confirms that "it has determined based upon the record before it, including evidence of shortfalls and delays in the movement of certain traffic to terminals, that a number of matters related to CN's and CP's service warrant further examination in the second phase of the Proceeding."

121. Specifically, the Agency has directed CN to respond to the following question:

> Did CN provide the highest level of service in respect of its obligations under sections 113-115 of the CTA that it could reasonable provide in the circumstances, having regard to considerations listed in subsection 116(1.2) of the CTA; notably, whether and the extent to which:
>
> • CN had in place, and activated, adequate contingency plans to respond to rising congestion in Thornton Yard;
>
> • CN deployed sufficient crews and locomotives to provide the requested service as the volume of traffic increased, particularly for yard assignments at Thornton Yard, Lynn Creek Yard and McLean (West Vancouver) Yard;
>
> • CN appropriately considered and implemented a full range of traffic management measures to deal with increased volumes of traffic, such as sending certain traffic bound for the North Shore through West Vancouver by way of Squamish and Prince George rather than Thornton Yard; assembling manifest traffic destined to the North Shore in
>
> yards other than Thornton Yard, Lynn Creek Yard and McLean Yard; and using available car storage space at North Shore terminals;
>
> • the placement of embargoes on wood pulp traffic (embargoes CN004318, CN004418, CN004518, CN004618, CN004718, CN004818 and CN004918) was exceptional rather than routine in nature, proportionate, targeted and non-discriminatory;
>
> • the placement of embargoes on other traffic (embargoes CN005018, CN005118 and CN005218) was exceptional rather than routine in nature, proportionate, targeted, and non-discriminatory;
>
> • a lack of coordination regarding delivery levels and timing between certain shippers and the terminals with which they have contracts contributed to shortfalls and delays in the delivery of traffic to the North Shore;
>
> • there are improvements to railway infrastructure in the Vancouver area that would help reduce congestion issues, which CN has the ability to

> undertake either on its own or in partnership with others, that have not been initiated to date.[46]

122. As noted above in CN's comments on procedural fairness, the Agency does not provide a timeframe in its question. In order to respond, CN has assumed the question relates strictly to October 2018 to January 2019 and it has limited its answer accordingly.

123. During this four month period, CN moved over 225,000 cars on approximately 2,100 trains into the Greater Vancouver area. There was an average of 98 shippers and 80 origins for the traffic. A majority of this traffic moved under confidential contracts between CN and the various shippers.[47]

124. The question CN has been directed to answer by the Agency is impossible to respond to given the provisions of s. 116 of the CTA. The Agency is essentially directing CN to prove that it met its statutory service obligation with respect to every shipper and every movement of traffic over the four month period. This is entirely inappropriate, for the reasons articulated above.

125. For movements governed by the level of service regime, CN has not been provided with sufficient information to defend itself and the Agency cannot consider the factors that it is required to by law. For movements governed by confidential contract, the terms of the confidential contract are binding on the Agency in determining CN's compliance with its service obligations.

126. None of the shippers who are parties to these contracts have alleged a breach by CN of the confidential contract, nor are any of these contracts before the Agency in these proceedings. Accordingly, the Agency is unable to determine whether CN has met its service obligations with respect to traffic governed by confidential contracts.

127. For the reasons noted above, and the fact that CN was only provided 20 days to respond, CN is not able to respond to the seven considerations identified in the Preliminary Decision with respect to the 225,000 plus cars moved during the four month period. CN is necessarily restricted to providing the following general comments on the listed considerations.

*(i) **Contingency Plans***[48]

128. During the period in question, CN undertook a number of steps to respond to rising congestion in Thornton Yard. As noted in CN's testimony at the Hearing, congestion at Thornton Yard was due primarily to unforeseen increases in volumes of traffic.

[46] Preliminary Decision at para 11.

[47] Many of these confidential contracts prescribed the level of service to be provided by CN to the shippers.

[48] Preliminary Decision at para 11, first bullet.

129. With respect to traffic interchanged with BNSF at Thornton Yard, Ms. Paul testified that there was "a 20 percent increase in traffic over this interchange versus the same time period last year. There was no advance warning or forecast of this volume. On top of that we dealt with weather impacts with heavy rain, slides and washout."[49]

130. As well, there were significant increases in traffic destined for Vancouver terminals via Thornton Yard. The increase in traffic at this time of year was described by Mr. Ryhorchuk as "exceptional"[50] and not experienced in previous years.

131. A second cause of the congestion related to the failure by pulp shippers and terminals to manage pipeline capacity to ensure that cars were not released to CN unless there was terminal authorization for unloading the cars. Unlike other commodities, pulp and other merchandise shippers will order cars for delivery to Vancouver terminals, despite the fact that the terminals are not prepared to unload the traffic. As a result, the cars end up using Thornton Yard as a "parking lot" until terminal authorization is granted.

132. In response to these unforeseen events, CN imposed embargoes on traffic destined for the BNSF interchange and an embargo permit system for pulp terminals to manage the traffic flow and reduce the congestion which arises where car releases do not match terminal authorization. In addition to steps taken in the Vancouver area, CN also took steps at origin and before trains arrived in the Vancouver area.

(ii) Resources Deployed – Crews and Locomotives [51]

133. CN reiterates the evidence of Mr. Ryhorchuk provided at the Hearing.[52] In the months of November and December 2018, there was an increase in volume of traffic to Vancouver terminals of 10% compared to the prior year. CN deployed 18% more locomotives and 16% more crews during this time period. CN also provided 165 locomotives to BNSF to move traffic to the US border. There has been no evidence advanced by any shipper, organization, or terminal that CN did not have sufficient crews and locomotives to provide service in the Vancouver area during this time period.

134. As confirmed by Mr. Ryhorchuk's testimony, which has not been refuted, congestion at Thornton Yard was not caused by a lack of CN crews or locomotives.

(iii) Traffic Management Measures [53]

135. CN considered and implemented all available and appropriate traffic management measures to deal with increased volumes of traffic.

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[49] Hearing Transcript dated January 30, 2019 at p. 267 lines 10-15.
[50] Hearing Transcript dated January 30, 2019 at p. 280 lines 22-23.
[51] Preliminary Decision at para 11, second bullet.
[52] Hearing Transcript dated January 30, 2019 at pp. 273-277.
[53] Preliminary Decision at para 11, third bullet.

136. Where possible and efficient to do so, CN rerouted traffic bound for the North Shore through Squamish and Prince George rather than through Thornton Yard. However, there are a number of operational challenges with the Squamish line that render its use impractical for this purpose. For example, the Squamish line is subject to significant grades, curves, and speed restrictions. In addition, more locomotives and crews are required to move the same volumes on the Squamish line compared to the Kamloops line. Accordingly, the Squamish line is less efficient and therefore taking crews and locomotives away from Thornton Yard and the Kamloops line to the Squamish line would not have helped with the congestion challenges.

137. During the periods of congestion, CN also assembled manifest trains in areas outside Thornton Yard, including Edmonton and Prince George, thereby reducing car handling in Thornton Yard. For the period September to November, 2018, the switching workload for manifest trains in Thornton Yard averaged 37 yard block cuts (each cut to a specific destination). In December and January, CN marshalled manifest trains at other locations and reduced the Thornton Yard workload average to 22 yard block cuts.

(iv) Embargoes on Wood Pulp Traffic [54]

138. CN reiterates the evidence given by the CN Panel at the Hearing.

139. Embargoes with permits were necessary due to the failure of wood pulp shippers and terminals to coordinate pipeline management. Had CN not implemented the permit system, congestion would have been worse. As demonstrated in the slide presentation tendered at the Hearing,[55] once embargoes and permits were imposed, congestion in Thornton reduced and more traffic was moved. The placement of embargoes and permits was exceptional rather than routine. The embargoes and permits were proportionate, targeted and non-discriminatory. On the latter point, embargoes and permits were imposed only on those shippers who do not have a system in place to match terminal authorization with car release. There was no other method for effectively managing this traffic, and no evidence has been raised to refute or contest this point.

(v) Embargoes on Other Traffic [56]

140. CN relies upon the evidence provided by the CN Panel at the Hearing regarding the appropriateness of the other embargoes at the BNSF interchange.

[54] Preliminary Decision at para 11, fourth bullet.

[55] CN Slide Presentation tendered on January 30, 2019 at slide 13.

[56] Preliminary Decision at para 11, fifth bullet.

(vi) ***Coordination of Delivery Levels and Timing*** [57]

141. Neither the Preliminary Decision nor the Second Inquiry Report identifies the "certain shippers" or the terminals. Nor do they particularize the alleged "lack of coordination". As a result, CN is not able to respond to this point.

(vii) ***Railway Infrastructure*** [58]

142. CN relies upon the evidence provided by the CN Panel at the Hearing.

143. Performance and efficiency in the Vancouver area is dependent upon the contributions of all members of the supply chain. Thornton Yard is physically constrained and cannot be expanded. CN provided evidence on other improvements to railway infrastructure which have been initiated to date. There are no other improvements to railway infrastructure which would help reduce congestion issues that CN has not already initiated.

144. There are railway-related infrastructure improvements which could be undertaken by some terminals. Terminals should have sufficient track capacity on site for multiple days of working cars. Terminals which unload an equal number of cars to their daily spot capacity, or unload more than their spot capacity do not have the flexibility to deal with inevitable interruptions in rail service (due to weather, congestion, equipment issues etc.). These terminals are forced to rely upon CN's processing yard to hold traffic, which leads to congestion.

V. CONCLUSION

145. The Agency cannot order a remedy without finding a breach of the level of service regime, and it cannot find a breach of the level of service regime without an allegation – much less specific and compelling evidence – of the same. For the reasons stated above, CN submits that it has complied with its service obligations throughout.

146. The own-motion power was not an invitation to the Agency to insert itself into the operations of the railways on a systemic basis, particularly on a record such as this. CN respectfully requests that the Agency bring an end to this investigation accordingly.

ALL OF WHICH is respectfully submitted at Saskatoon, Saskatchewan, this 26th day of March, 2019.

MLT Aikins LLP

Per: _____

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[57] Preliminary Decision at para 11, sixth bullet.

[58] Preliminary Decision at para 11, seventh bullet.

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VI. LIST OF AUTHORITIES

Case Authorities **Tab**

Decisions

Other References